TEXAS TRANSPORTATION COMMISSION

JEFFERSON County

MINUTE ORDER

BEAUMONT District

On October 30, 2014, the Texas Transportation Commission (commission) considered the staff's proposed cancellation of Outdoor Advertising Permit Number 20860, held by Direct Advertising, Inc. Direct Advertising requested a contested case hearing and the matter was referred to the State Office of Administrative Hearings. The Administrative Law Judge concluded in the amended proposal for decision that the permit should be canceled. Under the Administrative Procedure Act and the commission's rules, the matter is now appropriate for entry of a final order by the commission.

IT IS THEREFORE ORDERED that the commission issues the attached order in the case of Texas Department of Transportation v. Direct Advertising, Inc., Docket No. 601-14-0875, and directs the executive director to take the necessary steps to implement this order.

Submitted and reviewed by:

General Counsel

Recommended by:

Executive Director

114097 OCT 30 14

Minute Number | Date Passed

State Office of Administrative Hearings

Cathleen Parsley
Chief Administrative Law Judge

April 22, 2014

Phil Wilson
Executive Director
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701

VIA INTER-AGENCY

RE: Docket No. 601-14-0875; Texas Department of Transportation v. Direct Advertising, Inc.

Dear Mr. Wilson:

Please find enclosed a Proposal for Decision in this case. It contains my recommendation and underlying rationale.

Exceptions and replies may be filed by any party in accordance with 1 TEX. ADMIN. CODE § 155.507(c), a SOAH rule which may be found at www.soah.state.tx.us.

Sincerely,

Paul D. Keeper

Paul D. Keeper
Administrative Law Judge

PDK/eh
Enclosure
xc: Oren L. Connaway, Assistant Attorney General, Transportation Division, P. O. Box 12548, Austin, TX 78711-2548 - **VIA REGULAR MAIL**
Michael Brown, President, Direct Advertising, Inc., 1 Plaza Square, Port Arthur, TX 77642 – **VIA REGULAR MAIL**
Kristina Silcocks, Interim Chief, Transportation Division, Office of the Attorney General, 300 W. 15th St., 14th Floor, Austin, TX 78701 - **VIA INTER-AGENCY**
Randy Hill, Division Chief, Transportation Division, Office of the Attorney General, 300 W. 15th St., 14th Floor, Austin, TX 78701 – **VIA INTER-AGENCY**

SOAH DOCKET NO. 601-14-0875

TEXAS DEPARTMENT OF TRANSPORTATION, **Petitioner**	§	**BEFORE THE STATE OFFICE**
	§	
	§	**OF**
v.	§	
	§	
DIRECT ADVERTISING, INC., **Respondent**	§	**ADMINISTRATIVE HEARINGS**

PROPOSAL FOR DECISION

Direct Advertising, Inc. (Direct Advertising), Respondent, appealed the decision of the Staff of the Texas Department of Transportation (Department), Petitioner, to cancel Outdoor Advertising License No. 7471 and Outdoor Advertising Display Permit No. 20860 for an advertising sign in Groves, Jefferson County, Texas. Staff alleged that Direct Advertising: (1) failed to maintain the required permit plate on the sign; (2) placed the sign within five feet of a public right-of-way; and (3) maintained the sign from a public right-of-way. The administrative law judge (ALJ) recommends that the Department's decision to find Direct Advertising in violation be sustained but that the penalty be changed.[1]

I. NOTICE AND JURISDICTION

Neither party challenged the sufficiency of notice or jurisdiction in this docket. Those matters are addressed in the findings of fact and conclusions of law.[2] The ALJ convened the hearing on February 19, 2014. Attorney Oren Connaway represented Staff of the Department. Michael Brown, president of Direct Advertising, represented his company. The hearing concluded the same day. The parties agreed to submit written closing arguments by

[1] Shortly after ALJ Richard Wilfong conducted the hearing, he announced his retirement from the State Office of Administrative Hearings (SOAH). The Chief ALJ's designee reassigned the case to the undersigned ALJ. 1 Tex. Admin. Code § 155.151(c). The designated ALJ read the transcript, examined the exhibits, and reviewed Staff's closing written argument in preparing this Proposal for Decision.

[2] The Department had docketed two cases involving Direct Advertising on February 19, 2014, this one and SOAH Docket No. 601-14-1366. The allegations in the second case involved a different sign than the sign described in this docket. At the hearing, the ALJ granted Direct Advertising's motion for continuance in Docket No. 601-14-1366, based on Respondent's claim of lack of notice. Transcript (Tr.) at 8-13.

March 14, 2014. Staff timely filed a written closing argument. Direct Advertising did not file a written closing argument. The record closed at 5:00 p.m., March 14, 2014.

II. APPLICABLE LAWS

The Department is responsible for regulating the erection and maintenance of outdoor advertising, as part of the State of Texas' compliance with the federal Highway Beautification Act of 1965.[3] That regulatory scheme requires a person to obtain an outdoor advertising license and a permit to erect or maintain outdoor advertising in designated areas.[4] A person commits an offense if he or she wilfully erects or maintains outdoor advertising without the types of licenses or permits required by law.[5]

The Department has adopted rules to effect the statutory scheme.[6] The rules require an owner of a sign to securely attach a sign permit plate to the sign.[7] A sign may not be erected or maintained within the right-of-way of a public roadway or where part of the sign face is within five feet of the highway's right-of-way line.[8] A sign may not be erected in or maintained from the State's right-of-way.[9]

The Department may cancel a permit for a sign if it is in violation of the Department's rules.[10] Before initiating an enforcement action, the Department must give the owner a 60-day written notice to correct the deficiencies.[11] If the error is not corrected by the deadline, the Department may determine that the permit should be canceled, and the Department must notify the owner in writing of the decision.[12] The owner may request an administrative hearing.[13]

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[3] Tex. Transp. Code (Code) §§ 391.002(b) and 391.036.

[4] Code §§ 391.031, 391.032, 391.061, 391.062, and 391.068.

[5] *Id.*

[6] 43 Tex. Admin. Code ch. 21, subch. I.

[7] 43 Tex. Admin. Code § 21.165(a).

[8] 43 Tex. Admin. Code §§ 21.145(b) and 21.186.

[9] 43 Tex. Admin. Code § 21.199(a)(2).

[10] 43 Tex. Admin. Code § 21.176(a).

[11] 43 Tex. Admin. Code § 21.176(b).

[12] 43 Tex. Admin. Code § 21.176(c).

If the Department cancels a sign permit, or if the Department concludes that the sign is erected or maintained in violation of the Department's rules, then the Department may make a written demand that the owner move the sign.[14] To relocate a sign, an owner must obtain a new permit.[15]

III. EVIDENCE

On July 24, 2008, the Department approved the erection of a 42.5-foot-high sign to be owned by Direct Advertising. The sign was to be placed near the intersection of 25th Street and State Highway 73 in Groves, Texas.[16] The Department renewed the permit in each of the three years following the issuance of the permit and license.[17] However, on September 8, 2011, Wallace Magaña, a Department inspector, conducted a field visit and noted that the sign's permit plate was no longer attached.[18] On February 29, 2012, the Department sent Direct Advertising a written notice about the permit violation.[19] Direct Advertising did not respond or request a replacement permit.[20]

On May 29, 2012, Department inspector Jeneane Dyer testified that she reinspected the sign to see if the permit plate had been replaced. She did not find one, and she began inspecting the sign for other potential violations.[21]

Ms. Dyer noted in her report that the Department had approved maintenance of the sign by entry from 25th Street. She determined that the only way to gain vehicular access to the sign was by traversing the state right-of-way from State Highway 73. While she was looking at the

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[13] 43 Tex. Admin. Code § 21.176(d),(e).

[14] 43 Tex. Admin. Code § 21.198(a).

[15] 43 Tex. Admin. Code § 21.192(b).

[16] State Ex. 8.

[17] Tr. at 34 and 92; Resp. Ex. 3.

[18] Tr. at 24-25; State Exs. 1 and 8.

[19] Tr. at 88.

[20] Tr. at 89.

[21] Tr. at 33.

access, she found other vehicles' tracks across the right-of-way to the sign. Ms. Dyer concluded that the sign had been maintained by someone's driving a vehicle across the State Highway 73 right-of-way.

In addition, Ms. Dyer noted that the original permit limited the edge of the sign to a distance of no closer than ten feet from the highway's right-of-way line.[22] To determine the exact location of sign in relation to the right-of-way, Ms. Dyer contacted the Department's local surveyor, Joe Breaux.

Mr. Breaux made an inspection and determined that most of the property surrounding the sign was in the state's right-of-way.[23] However, Mr. Breaux testified that it would be possible for someone to gain access to the sign by crossing other public and private properties.[24] Mr. Breaux also determined that the sign protruded into the right-of-way, creating an encroachment of about seven feet, measured from the top of the sign and not from the monopole support structure.[25]

On July 2, 2012, Gus E. Cannon, a Department employee, sent Direct Advertising a written notice of cancellation of the permit.[26] The cancellation was based on Direct Advertising's failure to correct the violation of the missing permit plate. On July 19, 2012, Direct Advertising sent the Department a letter that included an application for a new permit plate and a request for an administrative hearing.[27] The letter explained that the permit plate had been lost in one of the recent hurricanes.

On October 19, 2012, Mr. Cannon sent an updated notice of cancellation.[28] In this updated notice, the Department alleged that Direct Advertising: (1) failed to have a plate permit

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[22] Tr. at 29; State Ex. 2.

[23] Tr. at 65-66; State Ex. 6.

[24] Tr. at 82.

[25] Tr. at 67-69.

[26] State Ex. 8.

[27] State Ex. 10.

[28] State Ex. 9.

on the sign or to apply for a replacement within 60 days of notice; (2) allowed the sign to be erected or maintained so that part of the sign nearest a highway was within five feet of the highway's right-of-way line; and (3) erected or maintained a sign from the right-of-way.

At some point, Direct Advertising took down the sign and moved it to another location a short distance away.

IV. ANALYSIS

A. Alleged Violations

Staff offered in evidence the testimony of Ms. Dyer, Mr. Breaux, and Brad Matejowsky, the Department employee who worked with Mr. Cannon and who sponsored the two notices of violation. As part of Staff's witness testimony, Staff offered in evidence copies of Direct Advertising's original application, the field inspection logs of Mr. Magaña and Ms. Dyer, the maps of the rights-of-way gathered by Mr. Breaux, and more than 40 photographs of the sign and the area surrounding it.

Direct Advertising offered no testimony, relying instead on its cross-examination of Staff's three witnesses. During cross-examination, Michael Brown challenged the accuracy of Staff's witnesses' testimony by making his own statements and replies. In each instance, the ALJ reminded Mr. Brown that he could give testimony only as a witness. Mr. Brown rested the defense without testifying or calling any other witnesses to testify, despite the ALJ's giving him the opportunity to reconsider his decision.[29] Direct Advertising's documentary evidence was a photo of the site from which the sign had been removed,[30] and a map showing the rights-of-way surrounding the sign's location.[31]

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[29] Tr. at 106-07.

[30] Resp. Ex. 2.

[31] Resp. Ex. 3

Staff had the burden of proving its case by a preponderance of the evidence in the record.[32] Staff's burden was to prove the three issues raised in its petition.

1. Absence of a Permit Plate

Staff proved that Direct Advertising failed to have a permit plate on the sign. Mr. Magaña made that observation on September 8, 2011, when he inspected the sign. Direct Advertising submitted no written response to the Department when Staff sent a first notice of violation on February 29, 2012. The deadline for Direct Advertising to respond to the notice was April 30, 2012.

Ms. Dyer noted no permit plate when she reinspected the sign on May 29, 2012. By the time Mr. Cannon sent Direct Advertising the notice of cancellation on July 2, 2012, Direct Advertising had taken no action to correct the missing permit plate. Direct Advertising applied for a replacement permit plate on July 19, 2012, about two-and-a-half months after the expiration of the 60-day correction period. Staff sustained its burden of proof on this issue.

2. Erecting or Maintaining the Sign within the Right-of-way

The Department's rules prohibit a sign from being "erected or maintained within the right-of-way of a public roadway."[33] The rules also prohibit "a person from erecting or maintaining a sign within the right-of-way of a public roadway or where part of the sign face is within five feet of the highway's right-of-way line.[34] The testimony of Mr. Breaux, a trained surveyor, was sufficient to prove that the sign was within five feet of State Highway 73's right-of-way line. In the absence of any controverting evidence, Staff sustained their burden of proof on this issue.

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[32] 1 Tex. Admin. Code § 155.427.

[33] 43 Tex. Admin. Code § 21.145(b).

[34] 43 Tex. Admin. Code § 21.186. The provisions of 43 Tex. Admin. Code §§ 21.145(b) and 21.186 govern the location in which a person erects or maintains a sign.

3. Erecting or Maintaining a Sign from the Right-of-way

The Department's rules prohibit a person from using a public right-of-way for the purpose of erecting a sign or, once the sign is erected, from using the right-of-way to maintain the sign.[35] Staff had no photographic evidence or testimony showing how Direct Advertising had erected or maintained the sign. But, Staff's photographs showed that vegetation grew around the sign,[36] and Ms. Dyer's testimony described tracks made by vehicles through the vegetation into and out of the site. The ALJ found it reasonable to conclude that Direct Advertising had used the public right-of-way for the purpose of maintaining the sign.

Similarly, Direct Advertising offered no evidence about its maintenance of the sign. Mr. Brown's cross-examination repeatedly suggested that a person could have used routes other than the public right-of-way to reach the sign during maintenance. Evidence in support of that assertion might have been given by the maintenance company hired by Direct Evidence (if there was one) or by Direct Advertising's own employees if they were used for maintenance. No direct evidence was offered by Direct Advertising on this point. Staff sustained their burden of proof on this issue.

B. Appropriate Penalties

1. Contrasting Rules on Penalties

The issue is: What is the most appropriate penalty among the sanctions available to the Department? Staff relied solely on the provisions of 43 Texas Administrative Code § 21.176(a), a list of violations for which the Department "will cancel" a permit.[37] The rule focuses on the qualities of the sign and not on the actions of persons. For example, the Department may cancel

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[35] 43 Tex. Admin. Code § 21.199(a)(2). This rule governs the manner in which a person reaches a sign for the purpose of erecting or maintaining it.

[36] State Ex. 1.

[37] The meaning of the phrase "will cancel" in 43 Texas Administrative Code § 21.176 is unclear. The phrase seems to reflect the Department's intention to impose the penalty, but the phrase may also be interpreted to mean that the Department "shall cancel." Staff presented no information about the Department's interpretation of the rule.

a permit if a sign "is removed," "is not maintained," or "is damaged."[38] Although the rule requires the Department to notify the sign owner about some of the 11 possible violations before the Department may cancel the permit, the rule looks only at the status of the sign and not at the identity of the person who created the status.

However, the Department has another rule, 43 Texas Administrative Code § 21.204, that allows it to impose monetary penalties against violators. Staff did not rely on this rule in its pleadings or arguments. Nonetheless, the rule is part of the Department's statutory scheme for the regulation of this area of commerce. The ALJ will consider its application.

The rule at 43 Texas Administrative Code § 21.204 states that the Department may impose monetary administrative penalties against a person who intentionally violates the Code or the Department's rules.[39] Some of the violations listed in this rule are duplicated in the list of potential violations for which the Department "will cancel" a permit under 43 Texas Administrative Code § 21.176. Except in one relevant subsection, the Department's rules provide no clue about which penalty should be imposed when the same violation is addressed under each penalty rule.

The exception is found in 43 Texas Administrative Code § 21.204(b)(2)(B). The rule authorizes the Department to impose a $250 administrative penalty for "erecting the sign at the location other than the location specified on the application, *except that if the actual sign location does not conform to all other requirements[,] the department will seek cancellation of the permit* . . . ." [Emphasis supplied.] For this sole type of violation, the Department will cancel the permit and may not seek a monetary penalty.

One possible reading of the rule is that it reflects a policy of the Department about the imposition of sanctions. That policy may be not to impose both types of sanctions, cancellation and monetary penalties, for the same violation. Another policy implication may be that the Department considers some types of violations—including placing a sign in an unapproved

[38] 43 Tex. Admin. Code § 21.176(a)(1)-(3).

[39] 43 Tex. Admin. Code § 21.204(a).

location—more serious than others, for which the more severe penalty of cancellation will be imposed.

A puzzling element to this analysis is that the Department's rules imposing monetary penalties require the Department to show that a violator acted intentionally. Since monetary penalties may be regarded as of lesser severity than cancellation, it is unclear how to interpret the rules' silence about intent when imposing the greater sanction of permit cancellation.

In applying the laws to the facts in this case, the ALJ must first assume that the Department did not intend to create a conflict in the laws[40] and that the rules may be applied according to their ordinary or common meanings.[41] Harmonizing those two principles of construction is challenging under the rules as written.

1. Penalty for Absence of a Permit Plate

Staff provided the only evidence about Direct Advertising's explanation for the permit plate violation. On July 19, 2012, Direct Advertising wrote a letter to Ms. Cannon in response to the first cancellation notice of July 2, 2012.[42] Direct Advertising explained: "Evidently[,] one of the hurricanes blew it [the permit plate] off the pole. Your July 2, 2012 [letter], was the first notification we received regarding the matter." Staff did not refute the explanation. The evidence shows that the absence of a plate permit violated the rules. However, the evidence shows that the violation was unintentional.

An administrative penalty of $150 would have been available under 43 Texas Administrative Code § 21.204(b)(1) if Direct Advertising had intentionally violated the plate permit requirement. But, Direct Advertising's letter indicated that its violation was unintentional, making the monetary penalty unavailable.

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[40] *Tex. Workers' Comp. Ins. Fund v. Del Indus.*, 35 S.W.3d 591 593 (Tex. 2000).

[41] Tex. Gov't Code § 312.002; *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432 439 (Tex 2011).

[42] State Ex. 10.

Cancellation of the permit is available under the terms of 43 Texas Administrative Code § 21.176(a)(11). That rule states that the Department will cancel the permit if the sign "does not have permit plate properly attached under § 21.165 of [the Department's rules.]" The provisions of 43 Texas Administrative Code § 21.165(d) require the owner to submit to the Department a request for a replacement plate if the plate is lost or stolen. The penalty for the owner's failure to apply for a replacement plate or to attach the plate to the sign "may result in the cancellation of the permit under § 21.176 of [the Department's rules.]"[43] Under the language of 43 Texas Administrative Code § 21.165(d), the Department's decision to cancel the permit is discretionary.

The result of the Department's cancellation of a permit is that the owner must remove the sign at no cost to the state.[44] In the facts in this case, Direct Advertising already has removed the sign from its initial location, apparently in anticipation of an adverse ruling on these issues. Whether Direct Advertising's relocation of the sign constitutes a separate violation of the Department's laws is an issue beyond the scope of this proceeding.

Nonetheless, Staff carried its burden of proving a violation of its rules and proved that cancellation is authorized under the rules.

2. Penalty for Erecting or Maintaining the Sign within the Right-of-way

The Department proved that Direct Advertising violated 43 Texas Administrative Code §§ 21.145(b) ("A sign may not be erected or maintained within the right of way of a public roadway . . . .") and 21.186 ("A sign may not be erected so that the part of the sign face nearest a highway is within five feet of the highway's right of way line").[45]

The monetary penalty provisions of 43 Texas Administrative Code § 21.204(b)(2)(B) permit the Department to impose a penalty of $250 against a person who intentionally erects a

[43] 43 Tex. Admin. Code § 21.165(e).

[44] 43 Tex. Admin. Code § 21.198(a).

[45] The spelling of "right-of-way" is made without hyphens in the Code and rules.

sign other than the location specified on the application.[46] Staff did not allege any violations about the location of the sign—that is, the place at which the monopole support entered the ground. Instead, Staff proved that the face of the sign encroached into the right-of-way. A monetary penalty is not available for this violation.

The same rule also states, "[I]f the actual sign location does not conform to all other requirements[, then] the Department will seek cancellation of the permit." The rule does not require cancellation; instead, the rule permits the Department to "seek cancellation." The ALJ interprets the rule to mean that Staff must prove that it complied with the requirements for cancellation before that penalty may be imposed.

Staff proved that the sign made a seven-foot encroachment near the top of its 42.5-foot structure. On October 19, 2012, Staff informed Direct Advertising about this alleged violation at the same time that Staff gave Direct Advertising the notice of cancellation.[47] Although Staff's February 29, 2012 written notice identified Direct Advertising's failure to have the permit plate on the sign, the notice did not identify the alleged encroachment. Staff was required to "give the sign owner 60 days to correct the violation and provide proof of the correction to the department."[48] Staff did not comply with this procedural requirement before cancelling the permit. Consequently, the Department may not cancel the permit under 43 Texas Administrative Code § 21.204(b)(2)(B).

3. Penalty for Erecting or Maintaining the Sign from the Right-of-way

Staff proved that Direct Advertising violated 43 Texas Administrative Code § 21.204(b)(3)(A) (prohibiting a person from "maintaining or repairing the sign from the state right of way . . . .") and violated 43 Texas Administrative Code § 21.199(a)(2) ("A person may not erect or maintain a sign from the right of way").

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[46] 43 Tex. Admin. Code § 21.204(b)(2)(B).

[47] State Ex. 9.

[48] 43 Tex. Admin. Code § 21.204(d).

The monetary penalty provisions of 43 Texas Administrative Code § 21.204(b)(3)(A) permit the Department to impose a penalty of $500 for either violation. The cancellation penalty provisions of 43 Texas Administrative Code § 21.176(a)(8) permit the Department to cancel a permit for the same violation.

As previously discussed in this Proposal for Decision, the rules do not state whether multiple penalties may be imposed for the same violation. In construing statutes, the courts have held that a penal statute includes a civil statute that authorizes a penalty.[49] Penal statutes are strictly construed,[50] meaning that the statute must be construed "with any doubt resolved in favor of the accused."[51]

Using strict construction of the Department's rules, the ALJ finds that the question of which penalty should be applied should be resolved in favor of Direct Advertising. A monetary penalty of $500 under 43 Texas Administrative Code § 21.204(b)(3)(A) is more appropriate than the cancellation of the permit.

V. RECOMMENDATION

Staff proved that the Department may cancel the permit for Direct Advertising's failure to have a permit plate on the sign and that the Department may impose a $500 penalty for Direct Advertising's maintaining the sign from the right-of-way. Under these circumstances, the ALJ recommends that the Department impose the monetary penalty and not the cancellation of the permit.

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[49] *Brown v. De La Cruz*, 156 S.W.3d 560, 565 (Tex. 2004).

[50] *First Bank v. Tony's Tortilla Factory, Inc.*, 877 S.W.2d 285, 287 (Tex. 1994).

[51] *State v. Johnson*, 219 S.W.3d 386, 387-88 (Tex. Crim. App. 2007).

VI. FINDINGS OF FACT

1. On July 24, 2008, the Texas Department of Transportation (Department) approved the application of Direct Advertising, Inc. (Direct Advertising) for Outdoor Advertising License No. 7471 and Outdoor Advertising Display Permit No. 20860 for an 42.5-foot-high advertising sign in Groves, Jefferson County, Texas.

2. The sign was to be placed near the intersection of 25th Street and State Highway 73 in Groves, Texas.

3. The Department renewed the permit in each of the three years following the issuance of the permit and license.

4. On February 29, 2012, Staff (Staff) of the Department sent Direct Advertising a letter that the absence of a permit plate on the sign was a violation of the permit.

5. Direct Advertising did not make a request for a replacement permit.

6. On July 2, 2012, Staff sent Direct Advertising a written notice of cancellation of the permit, based on Direct Advertising's failure to correct the violation regarding the missing permit plate.

7. On July 19, 2012, Direct Advertising sent Staff a letter, including an application for a new permit plate and for an administrative hearing. The letter explained that the permit plate had been lost in one of the recent hurricanes.

8. On October 19, 2012, Staff sent Direct Advertising an updated notice of cancellation, which alleged that Direct Advertising: (1) failed to have a plate permit on the sign or to apply for a replacement within 60 days of notice; (2) allowed the sign to be erected or maintained so that part of the sign nearest a highway was within five feet of the highway's right-of-way line; and (3) erected or maintained a sign from the right-of-way.

9. At some point, Direct Advertising took down the sign and moved it to another location a short distance away.

10. Direct Advertising appealed the Department's decision to cancel Outdoor Advertising License No. 7471 and Outdoor Advertising Display Permit No. 20860.

11. On November 12, 2013, Staff issued a notice of hearing to Direct Advertising. The notice included a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing is to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.

12. On February 19, 2014, State Office of Administrative Hearing (SOAH) Administrative Law Judge (ALJ) Richard Wilfong convened a hearing on the merits. The hearing adjourned the same day.

13. Assistant Attorney General Oren A. Connaway represented Staff, and Michael Brown, president of Direct Advertising, represented Direct Advertising.

14. The administrative record closed on March 14, 2014.

15. Direct Advertising did not intentionally fail to secure the permit plate on the sign.

16. The sign did not have permit plate properly attached.

17. The sign was maintained within the right-of-way of a public roadway.

18. The sign was erected so that the part of the sign face nearest State Highway 73 was within five feet of the highway's right-of-way line.

VII. CONCLUSIONS OF LAW

1. The Department has jurisdiction over this matter. Tex. Transp. Code ch. 391.

2. SOAH has jurisdiction to hold a hearing and to issue a proposal for decision that includes proposed findings of fact and conclusions of law. Tex. Gov't Code §§ 2003.021 and 2003.042.

3. A designee of SOAH's Chief ALJ reassigned the case to the undersigned ALJ. 1 Tex. Admin. Code § 155.151(c).

4. Staff of the Department provided notice to Direct Advertising as required under law. Tex. Gov't Code §§ 2001.051 and 2001.052; 1 Tex. Admin. Code § 155.401; 43 Tex. Admin. Code §§ 21.176(b) and 21.204(e).

5. An owner of a sign must securely attach a permit plate to it. 43 Tex. Admin. Code § 21.165(a).

6. A sign may not be erected or maintained within the right-of-way of a public roadway or where part of the sign face is within five feet of the highway's right-of-way line. 43 Tex. Admin. Code §§ 21.145(b) and 21.186.

7. A sign may not be erected or maintained from the State's right-of-way. 43 Tex. Admin. Code § 21.199(a)(2).

8. The Department may cancel a permit for a sign if it is in violation of the Department's rules. 43 Tex. Admin. Code § 21.176(a).

9. Before initiating an enforcement action, the Department must give the owner a 60-day written notice to correct the deficiencies. 43 Tex. Admin. Code § 21.176(b).

10. If the error is not corrected within the deadline, the Department may determine that the permit should be canceled, and the Department must notify the owner in writing of the decision. 43 Tex. Admin. Code § 21.176(c).

11. The owner may request an administrative hearing. 43 Tex. Admin. Code § 21.176(d),(e).

12. ALJ Richard Wilfong conducted the hearing and shortly thereafter announced his retirement from SOAH. The Chief ALJ's designee reassigned the case to the undersigned ALJ. 1 Tex. Admin. Code § 155.151(c).

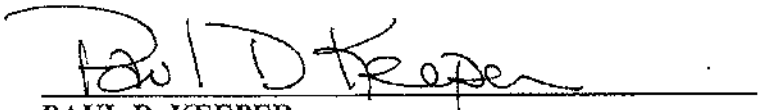
13. The ALJ must assume that the Department did not intend to create a conflict in the laws and that the rules may be applied according to their ordinary or common meanings. *Tex. Workers' Comp. Ins. Fund v. Del Indus.*, 35 S.W.3d 591 593 (Tex. 2000); Tex. Gov't Code § 312.002; *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432 439 (Tex. 2011).

14. In construing statutes, the courts have held that a penal statute includes a civil statute that authorizes a penalty. *Brown v. De La Cruz,* 156 S.W.3d 560, 565 (Tex. 2004).

15. Penal statutes are strictly construed, meaning that the statute must be construed "with any doubt resolved in favor of the accused." *First Bank v. Tony's Tortilla Factory, Inc.*, 877 S.W.2d 285, 287 (Tex. 1994); *State v. Johnson*, 219 S.W.3d 386, 387-88 (Tex. Crim. App. 2007).

16. The Department should impose a monetary penalty of $500 against Direct Advertising for its violations.

SIGNED April 22, 2014.



PAUL D. KEEPER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 7, 2014

Docketing Division
State Office of Administrative Hearings
William P. Clements Building
300 West 15th Street, Room 504
Austin, Texas 78711-3025

RE: Cause No. 601-14-0875; *Texas Department of Transportation v. Direct Advertising, Inc.*; Filed in the State Office of Administrative Hearings.

Dear Docketing Division Clerks:

Enclosed please find *TxDOT's Exceptions to Proposal for Decision* for filing in the above-referenced matter.
Please call if you have any questions.

Sincerely,

Brenda Shawn
Legal Secretary to
Oren L. Connaway
Assistant Attorney General
Transportation Division
(512) 463-2004

OLC/bks
Attachment
cc: Michael Brown, President
Direct Advertising, Inc.
Via: CMRRR# 7013 2630 0002 0190 9289

SOAH DOCKET NO. 601-14-0875

TEXAS DEPARTMENT OF TRANSPORTATION, Petitioner	§	BEFORE THE STATE OFFICE
V.	§	OF
DIRECT ADVERTISING, INC. Respondent	§	ADMINISTRATIVE HEARINGS

TxDOT's EXCEPTIONS TO PROPOSAL FOR DECISION

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE OF THIS COURT:

Petitioner, Texas Department of Transportation ("TxDOT" or "the Agency"), files this, its Exceptions to the Proposal for Decision ("PFD"), and respectfully requests the Administrative Law Judge ("ALJ") to modify his PFD and his recommendations to the Executive Director accordingly.

INTRODUCTION

1. Counsel for TxDOT received the PFD on April 23, 2014. Pursuant to 1 TEX.ADMIN.CODE §155.507(c), exceptions to the PFD are to be filed within 15 days after the date of service. As such, TxDOT's exceptions are timely filed.

2. TxDOT respectfully disagrees and excepts to the PFD, in which the ALJ denies affirmation of the Agency's discretionary cancellation of the Outdoor Advertising Sign Permit in question, OAS Permit No. 20860, and, instead, substitutes his own opinion that the agency should impose a $500 monetary penalty.

3. The PFD confirms that all alleged statutory and regulatory violations actually occurred. TxDOT sustained its burden of proof regarding Direct Advertising, Inc.'s ("Direct Ad") failure to exhibit its permit plate on the sign and its failure to timely take action to correct its violation of permit requirements regarding the missing plate. (PFD at 6). TxDOT sustained its

burden of proof regarding Direct Ad's illegally erecting or maintaining the sign with in the right-of-way of a public roadway. (*Id.*). TxDOT sustained its burden of proof regarding Direct Ad's illegally erecting or maintaining the sign from the State's right of way. (PFD at 7). In every instance, TxDOT identified the rules being violated and its statutory authority to enforce those rules with cancellation of the permit. Thus, TxDOT proved that cancellation was properly authorized under three documented rule violations.

4. The PFD confirms that TxDOT met its burden of proving its case by a preponderance of the evidence in the record in accordance with 1 TEX.ADMIN.CODE §155.427, but fails to apply TxDOT's specified Standard of Review and Burden of Proof (43 TEX.ADMIN.CODE §1.30). The appropriate standard of review is reasonableness. (*Id.* §1.30(a)). In a proceeding concerning an enforcement matter including the Agency's imposition of cancellation of an existing permit, "the department bears the burden of proof to show the person's violations of law or department policy." (*Id.* §1.30(c)).

5. The PFD does not demonstrate how TxDOT's application of its statutory discretion regarding the appropriate method of enforcement under the applicable rules is not reasonable. Nor does the PFD identify how he is authorized to substitute another part of the administrative code as grounds for overruling the cancellation in the absence of any evidence that the Agency's interpretation was correct.

6. On page 7 of the PFD, the ALJ states: "The issue is: What is the most appropriate penalty among the sanctions available to the Department?" The Petitioner would respectfully aver in response that the ALJ has erred. The issue for the ALJ is whether the Agency proved its case as to any one of three grounds asserted for cancellation of the permit under the rules cited in the

Petition and, if so, whether the Agency's choice of remedy was reasonable. Since no evidence exists that the Agency's choice of remedy was unreasonable the cancellation should be affirmed.

7. In these Exceptions, TxDOT urges the ALJ to modify his PFD to affirm and recommend the cancellation of the Permit in question, and to modify his Findings of Fact and Conclusions of Law accordingly.

FACTUAL EXCEPTIONS

Finding #5 should state: "Direct Advertising did not make a request for a replacement permit plate."

Finding #9 should state: "Mere days before the hearing convened, the sign was removed and relocated to a location a short distance west of its original location." (See Petitioner's Exhibit 4, formerly Respondent's Exhibit 1, which is a dated e-mail with a photograph).

Finding #10 should state: "Direct Advertising appealed the Department's decision to cancel Outdoor Advertising Sign Permit No. 20860." (TxDOT did not cancel Direct Ad's license).

Finding #13 should correctly identify the AAG as "Oren L. Connaway."

EXCEPTIONS TO CONCLUSIONS OF LAW

Conclusion #4 should omit reference to 43 TEX.ADMIN.CODE §21.204(e) because it only applies when the Agency has made a "determination to seek administrative penalties" under 43 TEX.ADMIN.CODE §21.204(a) for an intentional violation. In this case, TxDOT made a determination to seek a permit cancellation under 43 TEX.ADMIN.CODE §21.176 and it complied with all of the notice requirements required therein for the specified grounds for cancellation chosen by the Agency.

Conclusion #8 should state: "The department will cancel a permit...."

Conclusion #9 should state: "Before initiating an enforcement action of cancellation of permit for not having a permit plate properly attached under 43 TEX.ADMIN.CODE §21.165, the Department must give the owner a 60-day written notice to correct the deficiencies. 43 TEX.ADMIN.CODE §21.176(b)." The Agency proved through the testimony of Ms. Dyer that it complied with the 60-day requirement for failure to properly attach the plate. The 60-day requirement does not apply to the Agency's other two grounds for cancellation. Contrary to the specific limitation in §21.176(b), the ALJ demonstrates in the Contrasting Rules subsection of the PFD that he believes that the requirement applies to all eleven possible violations. *See* PFD pg. 8. This error is repeated on Page 11 and used to support the ALJ's decision that "Staff did not comply with this procedural requirement before cancelling the permit." No such procedural requirement exists for an encroachment violation of 43 TEX.ADMIN.CODE §21.145(b) or its enforcement by cancellation under 43 TEX.ADMIN.CODE §21.176(a)(2).

Conclusion #10 should state: "No 60-day written notice of violation is required where cancellation is alleged to grounded in 43 TEX.ADMIN.CODE §21.176(a)(2) or (a)(8)."

The text of Conclusion #16 should be deleted and replaced by the following statement from the text of the PFD's Appropriate Penalties section (PFD pg. 8): "Staff carried its burden of proving a violation of its rules and proved that cancellation is authorized under the rules."

Conclusion #17 should be added and state: "The Department should cancel Outdoor Advertising Sign Permit No. 20860 for failure to have the sign's permit plate properly attached, for erection and maintenance of the sign within the State's right of way, and for erection and maintenance of the sign from the State's right of way."

ARGUMENT

Within the bounds of its statutory authority, TxDOT, as an agency of Texas government, has broad discretion to determine the appropriate sanction for violations of its own licensing statute or rules. There is a substantial body of Texas law that supports this argument for agencies like TxDOT that are the ultimate decision makers concerning sanctions, even when a case has been submitted to SOAH on appeal. That is why a decision by the ALJ in a TxDOT enforcement case is subject to modification by the Executive Director under section 2001.058(e) of the APA, rather than section 2001.058(f).

When TxDOT determines that one of its statutes or rules has been violated, it is charged by law with discretion to determine the penalty. *See Tx.State Bd. Of Dental Exam'rs v. Brown*, 281 S.W.3d at 697 (Tex.App.—Corpus Christi 2009, pet. denied)(citing *Sears v. Tex. State Bd. of Dental Exam'rs,* 759 S.W.2d 748, 751 (Tex.App.—Austin 1988, no pet) *and, Firemen's & Policemen's Civil Serv. Comm'n v. Brinkmeyer,* 662 S.W.2d 953, 956 (Tex. 1984)). The mere labeling of a recommended sanction as a conclusion of law or as a finding of fact does not change the effect of the ALJ's recommendation when it substitutes the ALJ's penalty for another within the discretion of an agency. *Id.* (citing *Granek v. Tex. State Bd. Of Med. Exam'rs,* 172 S.W.3d 761, 781 (Tex.App.—Austin 2005, pet. denied)). In this case, without any supporting evidence, the ALJ postulates TxDOT policy *sua sponte* based on his reading of the rules, but fails to accept the fact that TxDOT's policy is to apply its statutory discretion on a case-by-case basis.

TxDOT is the decision-maker concerning sanctions for violations of the law or its rules. Findings of Fact numbers 16, 17, & 18 identify violations of specific rules identified in Conclusions of Law Nos. 5, 6, & 7. The clear conclusion is that the Agency has proven that Direct Ad has violated the relevant rules in support of the allegations in the amended Notice of

Cancellation. The choice of penalty is vested in the Agency and TxDOT is charged by law with discretion to determine the appropriate penalty. TxDOT has chosen to enforce the cancellation penalty against Direct Ad.

The applicable standard of review for a sign permit cancellation case is reasonableness. 43 TEX. ADMIN. CODE § 1.30(a). Reasonableness is the same standard applied by the Court of Appeals for substantial evidence appeals of administrative decisions. The Court of Appeals will sustain an agency's finding if reasonable minds could have reached the same conclusion, even if the evidence preponderates against it. *Brown* at 701. Under the substantial evidence rule, appeals courts give significant deference to the agency in its field of expertise. *See Tex. Health Facilities Comm'n v. Charter Med.-Dallas, Inc.,* 665 S.W.2d 446, 452 (Tex. 1984). They are concerned with the reasonableness of the agency's sanction, not whether alternative choices were discarded.

At the requested hearing in the present case, ALJ Wilfong was very diligent to give Direct Ad every opportunity to present any evidence that would support its appeal of its permit's cancellation. None was presented. Direct Ad's only argument at the hearing was that the sign had been removed and relocated by JGI, another licensed sign company. TxDOT wasn't even aware that the relocation had occurred, since it had been done mere days before the February 19 hearing. It was unclear what point Direct Ad wanted to make regarding the impact of the relocation, but, in the meantime since the sign's relocation, TxDOT has not received an application for a new permit or an amended one from Direct Ad nor JGI for the new location. Nor has it received a request to transfer the permit from Direct Ad to JGI.

Evidence is on the record that the sign was removed by the sign owner or an agent. *See* FoF #9. According to 43 TEX. ADMIN. CODE § 1.76(a)(1), "The department will cancel a permit for a sign if the sign: (1) is removed, unless the sign is removed and re-erected at the request of a

condemning authority;...." There is no evidence of any condemnation affecting the sign site. As an alternative to the corrective action the Petitioner has requested above, could a reasonable mind have reached the conclusion that the cancellation is moot?

CONCLUSION

In conclusion, the undisputed facts establish that TxDOT sustained its burden of proof as to more than one ground for cancellation of OAS Permit No. 20860. All necessary notices were timely sent and all actions necessary to support the cancellation were properly conducted. The agency's enforcement action was within its legal discretionary authority. Reasonable minds could have reached the same conclusion regarding cancellation as TxDOT. Therefore, the cancellation should be affirmed and the ALJ's PFD should be changed to reflect same.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the Texas Department of Transportation, Petitioner, asks the ALJ to modify his Findings of Fact, Conclusions of Law, and recommendations to the Executive Director as indicated above, and to grant TxDOT such further relief to which it is entitled.

Respectfully submitted,

GREG ABBOTT
ATTORNEY GENERAL OF TEXAS

DANIEL T. HODGE
FIRST ASSISTANT ATTORNEY GENERAL

DAVID C. MATTAX
DEPUTY ATTORNEY GENERAL FOR
DEFENSE LITIGATION

RANDALL K. HILL
ASSISTANT ATTORNEY GENERAL
CHIEF, TRANSPORTATION DIVISION

OREN L. CONNAWAY
ASSISTANT ATTORNEY GENERAL
Texas Bar No. 00785780
Transportation Division
P. O. Box 12548
Austin, Texas 7871-2548
Oren.Connaway@texasattorneygeneral.gov
Phone: (512) 463-2004
Fax: (512) 472-3855
Attorneys for Petitioner
TEXAS DEPARTMENT OF TRANSPORTATION

CERTIFICATE OF SERVICE

By my signature above, I hereby certify that a true and correct copy of the above and foregoing *TxDOT's Exceptions to Proposal for Decision* was sent via certified mail return receipt requested, on this the 7th day of May, 2014, to the following:

Michael Brown, President
Direct Advertising, Inc.
1 Plaza Square
Port Arthur, Texas 77642

CMRRR# 7013 2630 0002 0190 9289

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE
300 West 15th Street Suite 502
Austin, Texas 78701
Phone: (512) 475-4993
Fax: (512) 322-2061

DATE: **06/30/2014**

NUMBER OF PAGES INCLUDING THIS COVER SHEET: **6**

REGARDING: **EXCEPTIONS LETTER (BY ALJ)**

DOCKET NUMBER: **601-14-0875**

JUDGE PAUL D KEEPER

FAX TO:	**FAX TO:**
OREN CONNAWAY (OFFICE OF ATTORNEY GENERAL)	(512) 472-3855
MICHAEL BROWN (DIRECT ADVERTISING)	(409) 985-8813

xc: Docket Clerk, State Office of Administrative Hearings
NOTE: IF ALL PAGES ARE NOT RECEIVED, PLEASE CONTACT Erin Hurley(ehu) (512) 475-4993

State Office of Administrative Hearings

Cathleen Parsley
Chief Administrative Law Judge

June 30, 2014

Phil Wilson
Executive Director
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701

VIA FACSIMILE (512) 305-9567

RE: Docket No. 601-14-0875; Texas Department of Transportation v. Direct Advertising, Inc.

Dear Mr. Wilson:

I have received and reviewed the May 7, 2014 exceptions filed by the Texas Department of Transportation (Department). Direct Advertising filed no exceptions and no reply to the Department's exceptions. This letter contains my response to the Department's exceptions. 1 Tex. Admin. Code 155.507(d).

1. The Department asserts that the Proposal for Decision (PFD) fails to apply the Department's specified Standard of Review and Burden of Proof as set out in 43 Texas Administrative Code § 1.30(a). The Department cites to the rule to assert that "the standard of review is reasonableness." If the standard on which the Department relies is part of the statutory regulatory scheme created in chapter 391 of the Texas Transportation Code (Code), the Department did not identify that specific citation in its notice of hearing, briefs, or exceptions. As a consequence, the Department's rule alone forms the basis of the Department's argument.

A "standard of review" is the framework in which a reviewing court determines whether the trial court erred. W. Wendell Hall, Standards of Review in Texas, 38 St. Mary's L. J. 47, 58 (2006), cited in *City of Dallas v. Stewart*, 361 S.W.3d 562, 566 (Tex. 2012).

The Department's action in this case did not involve an administrative appeal conducted by the State Office of Administrative Hearings (SOAH). As described in detail in the Department's Notice of Hearing at item 18, Direct Advertising sought a hearing to challenge the Department's cancellation of its sign permit. The language of the governing rule, 43 Texas Administrative Code § 21.176 describes the administrative process as "the right of the permit holder to request an administrative hearing on the cancellation." The word "appeal" is not used.

Whatever may be the purpose and meaning of a "reasonableness" standard of review, that standard has no application in this proceeding. SOAH is not conducting a review of a prior final administrative decision. The question before the administrative law judge was whether the preponderance of the evidence supports the Department's cancellation of Direct Advertising's permit. Although the legal concept of "reasonableness" may be inherent in the determination of the weight to be given to a particular item of evidence, "reasonableness" alone is not part of the standard of proof. No standard of review is in play.

In addition, the Department relies on the language of 43 Texas Administrative Code § 21.176(f) for its contention that reasonableness is the proper standard of review. That rule states that, if an administrative hearing is timely requested, then the hearing will be conducted in accordance with chapter 1, subchapter E of chapter 43. The language in that subchapter governs "Procedures in Contested Case," and the reasonableness standard of review is included in the subchapter, found in 43 Texas Administrative Code § 1.30(a).

Although an agency that refers cases to SOAH may have its own rules of procedure, a referring agency's procedural rules "govern procedural matters that relate to the hearing only to the extent that the [SOAH] chief administrative law judge' s rules [has] adopt[ed] the [referring] agency's procedural rules by reference." Tex. Gov't Code § 2003.050(b). SOAH's chief administrative law judge has not adopted the Department's procedural rules. 1 Tex. Admin. Code § 155.3. The Department's procedural rules do not apply in this case.

Thus, the administrative law judge is not required to review the Department's action under a "reasonableness" standard of review but under a "preponderance of the evidence" standard of proof. The administrative law judge relied on that standard of proof in this proceeding. The administrative law judge recommends that the Department reject this exception.

2. The Department excepts to proposed Finding of Fact No. 5 and recommends the addition of the word "plate" after the word "permit." The administrative law judge recommends the adoption of the change.

3. The Department excepts to proposed Finding of Fact No. 9, which states: "At some point, Direct Advertising took down the sign and moved it to another location a short distance away." In place of that language, the Department requests that the finding be redrafted to read: "Mere days before the hearing convened, the sign was removed and relocated to a location a short distance west of its original location." The Department refers to Department Exhibit 4, formerly Direct Advertising Exhibit 1, "which is a dated email with a photograph."

The exhibit appears to include many photographs. The latest photograph appears to be dated "09/08/2011." The hearing on the merits was convened on February 19, 2014. No photograph is dated "mere days before the hearing convened." The administrative law judge recommends that the Department reject this exception.

4. The Department excepts to proposed Finding of Fact No. 10, which states: "Direct Advertising appealed the Department's decision to cancel Outdoor Advertising License No. 7471 and Outdoor Advertising Display Permit No. 20860." The Department asserts that the Department's decision did not include the cancellation of the license. The administrative law judge concurs with the Department's exception and recommends its adoption.

5. The Department excepts to proposed Finding of Fact No. 13 in that it fails to include the middle initial of the Department's assistant attorney general's representative, Oren L. Connaway. The request is frivolous and should be rejected.

6. The Department excepts to proposed Conclusion of Law No. 4 because it includes a reference to 43 Texas Administrative Code § 21.204(a). The Department asserts that the case involves a permit cancellation and not an intentional violation, as stated in the rule. The administrative law judge concurs and recommends that the reference be deleted.

7. The Department excepts to proposed Conclusion of Law No. 8, recommending the replacement of the word "may" with "will": "The Department ~~may~~ will cancel a permit for a sign if it is in violation of the Department's rules." The administrative law judge concurs and recommends that the proposed change be adopted.

8. The Department excepts to Conclusion of Law No. 9 and recommends the following language: "Before initiating an enforcement action of cancellation of permit for not having a permit plate properly attached under 43 Tex. Admin. Code § 21.165, the Department must give the owner a 60-day written notice to correct the deficiencies." 43 Tex. Admin. Code § 21.176(b)." The administrative law judge recommends adoption of the exception.

9. The Department excepts to Conclusion of Law No. 10: "If the error is not corrected within the deadline, the Department may determine that the permit should be canceled, and the Department must notify the owner in writing of the decision. 43 Tex. Admin. Code § 21.176(c)." The Department suggests that the conclusion of law be changed to read: "No 60-day written notice of violation is required where cancellation is alleged to grounded [sic] in 43 Tex. Admin. Code § 21.176(a)(2) or (a)(8)."

The language of 43 Texas Administrative Code § 21.176(c) requires the Department to notify a sign owner in writing about an alleged violation of subsection (b) of the rule "and will give the sign owner 60 days to correct the violation, provide proof of the correction, and if required, obtain an amended permit from the department."

The administrative law judge concurs that the provision does not require the 60-day period for correction of the violation and other requirements of the rule before canceling the permit. A corrected version of Department's suggested exception should be adopted, as follows: "No 60-day written notice of violation is required where cancellation is alleged to be grounded in 43 Tex. Admin. Code § 21.176(a)(2) or (a)(8)."

10. The Department excepts to Conclusion of Law No. 16: "The Department should impose a monetary penalty of $500 against Direct Advertising for its violations." The Department recommends the deletion of the conclusion and its replacement with: "Staff carried its burden of proving a violation of the rules and proved that cancellation is authorized under the rules." In light of the recommended changes to Conclusion of Law No. 10, the administrative law judge concurs with the exception.

11. The Department recommends that a Conclusion of Law No. 17 be added to read: "The Department should cancel Outdoor Advertising Sign Permit No. 20860 for failure to have the sign's permit plate properly attached, for erection and maintenance of the sign within the State's right of way, and for erection and maintenance of the sign from the State's right of way."

The administrative law judge concurs with the exception and recommends the adoption of the additional language.

Sincerely,

Paul D. Keeper
Administrative Law Judge

PDK:eh

cc: Party representatives

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE
300 West 15th Street Suite 502
Austin, Texas 78701
Phone: (512) 475-4993
Fax: (512) 322-2061

SERVICE LIST

AGENCY: **Transportation, Texas Department of (TXDOT)**

STYLE/CASE: **DIRECT ADVERTISING, INC. v. TDOT**

SOAH DOCKET NUMBER: **601-14-0875**

REFERRING AGENCY CASE: **123374971**

STATE OFFICE OF ADMINISTRATIVE HEARINGS	**ADMINISTRATIVE LAW JUDGE ALJ PAUL D. KEEPER**
REPRESENTATIVE / ADDRESS	**PARTIES**
OREN CONNAWAY ASSISTANT ATTORNEY GENERAL OFFICE OF ATTORNEY GENERAL TRANSPORTATION DIVISION 300 W. 15TH STREET, 12TH FLOOR P.O. BOX 12548 AUSTIN, TX 78711 (512) 936-1133 (PH) (512) 472-3855 (FAX)	TEXAS DEPARTMENT OF TRANSPORTATION
MICHAEL BROWN PRESIDENT DIRECT ADVERTISING 1 PLAZA SQUARE PORT ARTHUR, TX 77642 (409) 344-2420 (PH) (409) 985-8813 (FAX) mb@omgroup.net	DIRECT ADVERTISING

Erin Hurley

From: XMediusFAX@soah.state.tx.us
Sent: June 30, 2014 4:37 PM
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MAILED TO MICHAEL BROWN. -EH

Time Submitted : Monday, June 30, 2014 4:39:04 PM CT
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Nb of Success Items : 0
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Status	Time Sent	Pages Sent	Duration	Remote CSID	Destination	Error Code
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Error message: Cannot reach destination.						

Time Submitted : Monday, June 30, 2014 4:21:04 PM CT
Time Completed : Monday, June 30, 2014 4:36:40 PM CT
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Nb of Failed Items : 1

Status	Time Sent	Pages Sent	Duration	Remote CSID	Destination	Error Code
Failure	Monday, June 30, 2014 4:36:30 PM CT	0	26		14099858813	300
Error message: Cannot reach destination.						
Success	Monday, June 30, 2014 4:22:21 PM CT	6	76	5124723855	5124723855	0

SOAH DOCKET NO. 601-14-0875

TEXAS DEPARTMENT OF TRANSPORTATION,	§	**TEXAS TRANSPORTATION**
Petitioner	§	
	§	
v.	§	**COMMISSION**
	§	
DIRECT ADVERTISING, INC.,	§	
Respondent	§	

ORDER

After proper notice was given to the parties, this matter was heard by an Administrative Law Judge (ALJ). The ALJ made and filed a proposal for decision containing findings of fact and conclusions of law, which the ALJ later amended in response to exceptions filed by staff of the Texas Department of Transportation. The Commission adopts the ALJ's amended findings and conclusions as set forth below.

I. FINDINGS OF FACT

1. On July 24, 2008, the Texas Department of Transportation (Department) approved the application of Direct Advertising, Inc. (Direct Advertising) for Outdoor Advertising License No. 7471 and Outdoor Advertising Display Permit No. 20860 for a 42.5-foot-high advertising sign in Groves, Jefferson County, Texas.

2. The sign was to be placed near the intersection of 25th Street and State Highway 73 in Groves, Texas.

3. The Department renewed the permit in each of the three years following issuance of the permit and license.

4. On February 29, 2012, Staff (Staff) of the Department sent Direct Advertising a letter that the absence of a permit plate on the sign was a violation of the permit.

5. Direct Advertising did not make a request for a replacement permit plate.

6. On July 2, 2012, Staff sent Direct Advertising a written notice of cancellation of the permit, based on Direct Advertising's failure to correct the violation regarding the missing permit plate.

7. On July 19, 2012, Direct Advertising sent Staff a letter, including an application for a new permit plate and for an administrative hearing. The letter explained that the permit plate had been lost in one of the recent hurricanes.

8. On October 19, 2012, Staff sent Direct Advertising an updated notice of cancellation, which alleged that Direct Advertising: (1) failed to have a plate permit on the sign or to apply for a replacement within 60 days of notice; (2) allowed the

sign to be erected or maintained so that part of the sign nearest a highway was within five feet of the highway's right-of-way line; and (3) erected or maintained a sign from the right-of-way.

9. At some point, Direct Advertising took down the sign and moved it to another location a short distance away.

10. Direct Advertising appealed the Department's decision to cancel Outdoor Advertising Display Permit No. 20860.

11. On November 12, 2013, Staff issued a notice of hearing to Direct Advertising. The notice included a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing is to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.

12. On February 19, 2014, State Office of Administrative Hearing (SOAH) ALJ Richard Wilfong convened a hearing on the merits. The hearing adjourned the same day.

13. Assistant Attorney General Oren L. Connaway represented Staff, and Michael Brown, President of Direct Advertising, represented Direct Advertising.

14. The administrative record closed on March 14, 2014.

15. Direct Advertising did not intentionally fail to secure the permit plate on the sign.

16. The sign did not have the permit plate properly attached.

17. The sign was maintained within the right-of-way of a public roadway.

18. The sign was erected so that part of the sign face nearest State Highway 73 was within five feet of the highway's right-of-way line.

II. CONCLUSIONS OF LAW

1. The Department has jurisdiction over this matter. Tex. Transp. Code ch. 391.

2. SOAH has jurisdiction to hold a hearing and to issue a proposal for decision that includes findings of fact and conclusions of law. Tex. Gov't Code §§2003.021 and 2003.042.

3. A designee of SOAH's Chief ALJ reassigned the case to the undersigned ALJ. 1 Tex. Admin. Code §155.151(c).

4. Staff of the Department provided notice to Direct Advertising as required under law. Tex. Gov't Code §§2001.051 and 2001.052; 1 Tex. Admin. Code §155.401; and 43 Tex. Admin. Code §21.176(b).

5. An owner of the sign must securely attach a permit plate to it. 43 Tex. Admin. Code §21.165(a).

6. A sign may not be erected or maintained within the right-of-way of a public roadway or where part of the sign face is within five feet of the highway's right-of-way line. 43 Tex. Admin. Code §§21.145(b) and 21.186.

7. A sign may not be erected or maintained from the State's right-of-way. 43 Tex. Admin. Code §21.199(a)(2).

8. The Department will cancel a permit for a sign if it is in violation of the Department's rules. 43 Tex. Admin. Code §21.176(a).

9. Before initiating an enforcement action of cancellation of a permit for not having a permit plate properly attached under 43 Tex. Admin. Code §21.165, the Department must give the owner a 60-day written notice to correct the deficiencies. 43 Tex. Admin. Code §21.176(b).

10. No 60-day written notice of violation is required where cancellation is alleged to be grounded in 43 Tex. Admin. Code §21.176(a)(2) or (a)(8).

11. The owner may request an administrative hearing. 43 Tex. Admin. Code §21.176(d), (e).

12. ALJ Richard Wilfong conducted the hearing and shortly thereafter announced his retirement from SOAH. The Chief ALJ's designee reassigned the case to the undersigned ALJ. 1 Tex. Admin. Code §155.151(c).

13. The ALJ must assume that the Department did not intend to create a conflict in the laws and that the rules may be applied according to their ordinary or common meanings. *Tex. Workers' Comp. Ins. Fund v. Del Indus.,* 35 S.W.3d 591, 593 (Tex. 2000); Tex. Gov't Code §312.002; *TGS-NOPEC Geophysical Co. v. Combs,* 340 S.W.3d 432, 439 (Tex. 2011).

14. In construing statutes, the courts have held that a penal statute includes a civil statute that authorizes a penalty. *Brown v. De La Cruz,* 156 S.W.3d 560, 565 (Tex. 2004).

15. Penal statutes are strictly construed, meaning that the statute must be construed "with any doubt resolved in favor of the accused." *First Bank v. Tony's Tortilla Factory, Inc.,* 877 S.W.2d 285, 287 (Tex. 1994); *State v. Johnson,* 219 S.W.3d 386, 387-88 (Tex. Crim. App. 2007).

16. Staff carried its burden of proving a violation of the rules and proved that cancellation is authorized under the rules.

17. The Department should cancel Outdoor Advertising Sign Permit No. 20860 for failure to have the sign's permit plate properly attached, for erection and

maintenance of the sign within the State's right of way, and for erection and maintenance of the sign from the State's right of way.

The proposal for decision was properly served on all parties, who were given an opportunity to file exceptions and replies. Direct Advertising did not file exceptions. Department staff (through the Office of the Attorney General) filed exceptions on May 7, 2014. The ALJ filed a response to exceptions on June 30, 2014.

After full and complete consideration of the proposal for decision, including the opinion, findings of fact, and conclusions of law of the ALJ, exceptions, and the ALJ's response to exceptions, the Texas Transportation Commission issues this Order. The findings of fact and conclusions of law of the ALJ as amended by his recommendations in his response to exceptions are adopted.

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS TRANSPORTATION COMMISSION that:

1. Outdoor Advertising Permit Number 20860 is CANCELED.

2. No later than 30 days after this order is final under Tex. Gov't Code § 2001.144, Direct Advertising shall remove the Sign that is the subject of the canceled permit. The canceled permit is not a valid authorization to install and maintain a sign at any location.

Signed this 30th day of October, 2014.

_____
Ted Houghton, Jr., Chair
Texas Transportation Commission

_____
Fred Underwood, Commissioner
Texas Transportation Commission

_____
Jeff Austin, III, Commissioner
Texas Transportation Commission

_____
Jeff Moseley, Commissioner
Texas Transportation Commission

_____
Victor Vandergriff, Commissioner
Texas Transportation Commission